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In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Sections 170(c) and 501(c) of the Internal Revenue Code of 1954 grant to charitable and other organizations described in Section 501(c)(3) tax-exempt status and eligibility to receive tax-deductible contributions under Section 170(c)(2) on the condition that "no substantial part of the [organization's] activities * * * is carrying on propaganda, or otherwise attempting to influence legislation." The statute does not impose this restriction against influencing legislation on veterans' organizations qualifying for the same federal tax benefits under Sections 170(c)(3) and 501(c)(19).

The question presented is whether Congress' imposition of different standards with respect to the degree of permissible legislative activities by separate categories of tax-exempt organizations violates the equal protection guaranty of the Fifth Amendment.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a)and its order granting judgment in favor of the government (App. A, *infra*, 10a) is unofficially reported at 43 A.F.T.R.2d 79-679. The opinion of the court of appeals en banc (App. B, *infra*, 11a-121a) is reported at 676 F.2d 715.

JURISDICTION

This is a civil action against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States, brought by appellee pursuant to Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.), for a declaratory judgment with respect

to appellee's qualification for tax-exempt status under Section 501(c)(3) of the Code. The district court's jurisdiction rested on 28 U.S.C. 1346(e). A three-judge panel of the court of appeals entered an opinion and judgment on April 14, 1981 (App. B, *infra*, 15a). On June 11, 1981, the court of appeals granted appellee's suggestion for rehearing en banc and vacated the panel's opinion and judgment (*ibid.*). The judgment of the court of appeals en banc was filed on March 26, 1982 (App. B, *infra*, 11a). A notice of appeal to this Court was filed by the appellants on April 23, 1982 (App. C, *infra*, 122a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes an appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States or any agency or officer thereof is a party. An appeal may be taken where, as here, a federal statute is held unconstitutional as applied to particular circumstances. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 9, n.4 (1974).[1]

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[1] Although the court of appeals held that the combination of Sections 170(c)(2) and 501(c)(3), on the one hand, and Sections 170(c)(3) and 501(c)(19), on the other, violated the equal protection guaranty of the Fifth Amendment, it did not specify which statutory provisions must yield. Rather, it left the question of remedy to the district court (see pages 9-10, *infra*). As set forth above in our discussion of jurisdiction, we believe that the court has held unconstitutional a statute as applied to particular circumstances. If the Court concludes that the proper mode of review is by certiorari, this filing should be treated as a petition for a writ of certiorari under 28 U.S.C. 2103.

STATUTES INVOLVED

The relevant provisions of Sections 170(a), 170 (c), 501(a), 501(c), 2055(a), and 2522(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in App. D, *infra* 123a-144a.

STATEMENT

The material facts are undisputed and may be summarized as follows: Appellee is a nonprofit organization incorporated under the laws of the District of Columbia (A. 24).[2] As set forth in its application to the Internal Revenue Service for recognition as a tax-exempt organization, its purpose is to represent the general public, with regard to federal tax matters in the courts, at administrative hearings, and before Congress (App. A, *infra*, 1a-2a; App. B, *infra*, 13a; A. 26, 33). Appellee is the product of a merger between two other nonprofit corporations under common control—Taxation With Representation Fund (TWR Fund), and Taxation With Representation (TWR) (App. A, *infra*, 2a; App. B, *infra*, 13a n.1; A. 14, 16). Prior to the merger, TWR Fund, which published the journal *Tax Notes* and was devoted to courtroom advocacy, had qualified as a tax-exempt charitable and educational organization under Section 501(c)(3) of the Code eligible to receive tax-deductible contributions under Section 170(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) (App. A, *infra*, 2a; A. 16, 21, 52). TWR, which engaged primarily in legislative activities, in-

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[2] "A" refers to the separately bound record appendix filed in the court of appeals.

cluding attempts to influence legislation, had received recognition as a tax-exempt social welfare organization under Section 501(c)(4) of the Code. (App. A, *infra*, 2a-3a; App. B, *infra*, 13a, n.1; 16a, 19a, 20a.)[3]

During the pendency of TWR's unsuccessful prior attempt to challenge the constitutionality of the

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[3] A Section 501(c)(4) social welfare organization may engage in substantial lobbying in furtherance of its exempt purpose. Unlike a Section 501(c)(3) organization, a social welfare organization is not eligible to receive tax-deductible contributions or exemption from federal unemployment or social security taxes. See *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 29, n.1 (1976); Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(4)-1(a)(2)(ii) (26 C.F.R.). Prior to the merger, the IRS had denied recognition to TWR as a Section 501(c)(3) organization because it could not meet the requirement of that provision that "no substantial part" of its activities consist of "attempting to influence legislation." Seeking to establish that it qualified as a Section 501(c)(3) organization, TWR then sued in the United States District Court for the Eastern District of Virginia for a refund of federal unemployment taxes assessed for 1973 through 1975. It alleged in that proceeding that the lobbying limitation of Section 501(c)(3) violated its rights under the First and Fifth Amendments to the Constitution. The district court upheld the constitutionality of the statute and entered judgment for the government. *Taxation With Representation* v. *United States*, 76-2 U.S.T.C., ¶ 9693 (1976) (E.D. Va.). The court of appeals affirmed (585 F.2d 1219 (4th Cir. 1978)), and this Court denied certiorari (441 U.S. 905 (1979)). The court of appeals held that TWR's right to free speech and to petition Congress were not impaired by the lobbying restrictions of Section 501(c)(3) and 170(c)(2). Further, the court rejected TWR's argument that it was denied equal protection because Section 170(c)(3) permits veterans' organizations to lobby and still be eligible to receive tax-deductible contributions (585 F.2d at 1223-1224).

lobbying restrictions applicable to tax-exempt organizations under Section 501(c)(3) (see note 3, *supra*), appellee was formed in 1977 to absorb and carry forward the activities of TWR Fund and TWR, including TWR's lobbying activities (App. A, *infra*, 2a; App. B, *infra*, 13a, n.1; A. 16). Shortly after its incorporation, appellee applied to the Internal Revenue Service for recognition as a tax-exempt organization described in Section 501(c)(3) (App. A, *infra*, 3a; App. B, *infra*, 13a-14a; A. 32 *et seq.*). On February 14, 1978, the Service ruled that appellee did not qualify for exemption under Section 501(c)(3) and was therefore not eligible to receive tax-deductible contributions under Section 170(c)(2). The basis of the Service's determination was its finding that appellee's stated purpose included attempting to influence legislation, and that legislative advocacy might constitute a substantial part of its activities (App. A, *infra*, 3a; App. B, *infra*, 15a; A. 48). Although it appears that appellee may still qualify as a tax-exempt social welfare organization under Section 501(c)(4), that classification, as we have noted (see note 3, *supra*), would not entitle appellee to receive tax-deductible contributions. See 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2).

After exhausting its administrative remedies, appellee instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code[4] seeking a declaratory judg-

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[4] Section 7428 of the Code authorizes declaratory judgment actions in the Tax Court, the Court of Claims, and the United States District Court for the District of Columbia in cases relating to the status and classification of organizations under Section 501(c)(3). The statute was enacted in response to this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), holding that actions to enjoin

ment that it qualifies as an organization described in Section 501(c)(3). It raised two constitutional challenges to the lobbying restrictions of Sections 501(c)(3) and 170(c)(2). It first contended that withholding eligibility to receive tax-deductible contributions on the ground that it engaged in substantial lobbying activity imposed an unconstitutional condition on the exercise of its First Amendment rights of freedom of speech and association. Second, it claimed that Congress' failure to apply the same lobbying restrictions in Section 501(c)(3) to certain other tax-exempt groups eligible to receive tax-deductible contributions, most notably veterans' organizations, denied it equal protection of the laws under the Fifth Amendment (A. 5-6).[5]

The district court granted summary judgment in favor of the government (App. A, *infra*, 1a-10a). It concluded that the tax statutes did not unconstitutionally interfere with appellee's protected speech ac-

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the Commissioner's revocation of Section 501(c)(3) status were barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

[5] Veterans' organizations are eligible for tax-exempt status and the receipt of tax-deductible contributions under Sections 501(c)(19) and 170(c)(3) of the Code. Unlike Sections 501(c)(3) and 170(c)(2), the tax provisions governing veterans' organizations contain no express restrictions as to lobbying. Prior to the enactment of Section 501(c)(19) (by Section 1, Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656) veterans' organizations received exemption either as social welfare organizations (Section 501(c)(4)) or social clubs (Section 501(c)(7)). See H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 2 (1972). Veterans' groups, however, have been entitled, under Section 170(c)(3) and its predecessors, to receive tax-deductible contributions at least since 1924. See Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 269.

tivities. Relying on *Cammarano* v. *United States*, 358 U.S. 498 (1959), and the Fourth Circuit's decision rejecting the same claim in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), the district court concluded that the restriction against substantial legislative activity provided in Section 501(c)(3) did not penalize appellee for the content of its advocacy, but merely required that it conduct its legislative activities at its own, rather than at public, expense. This requirement, the court observed, served the legitimate purpose of assuring government neutrality toward the lobbying activities of charitable organizations and of preventing abuse of charitable lobbying by private interests (App. A, *infra*, 5a-7a). Further, the court found no denial of equal protection. In its view, since the challenged tax classification neither implicated a fundamental right or involved a suspect class, it was sufficient that the classification bore a rational relation to legitimate government objectives (*id.* at 8a).

A divided panel of the court of appeals affirmed. Thereafter, the full court of appeals vacated the panel decision and reheard the case en banc. Upon rehearing, a divided en banc court (7-3) reversed the district court and remanded the case for further proceedings. The court unanimously rejected appellee's contention that the lobbying limitation of Section 501(c)(3) violates its First Amendment rights. On the authority of this Court's decision in *Cammarano* v. *United States*, *supra*, it observed that "First Amendment rights are not abridged merely because the government refuses to subsidize those rights" (App. B, *infra*, 30a). As it viewed the lobbying limitations of Section 501(c)(3), "[c]haritable organizations are simply not required to waive their

Although the court held that "Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles" (*id.* at 72a), it declined to choose between striking down the lobbying restriction's application to Section 501(c)(3) organizations, or extending the restriction to Section 501(c)(19) veterans' organizations. As the court noted, the former course "poses the most obvious problems" insofar as "[t]he legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes" (App. B, *infra*, 73a). The court acknowledged that "Extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) organizations might open a Pandora's Box of woes and abuse" (*ibid.*). On the other hand, even though it believed the second course to be "the most logical and in accordance with the judgments expressed by Congress" (*id.* at 76a), the court was reluctant to impose limitations upon veterans' groups because none of those groups are party to the litigation (*id.* at 76a). It accordingly declined to prescribe a remedy. In its view, "[e]xactly how this problem should be cured is not a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us" (*id.* at 78a).

The court therefore remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief" (*id.* at 77a). The court, however, limited the district court to choosing between two courses of action to cure the unequal treatment

it found to exist—"either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations" (*id.* at 79a).

The dissenting judges would have held that it was within the power of Congress to place an anti-lobbying condition on the receipt of tax benefits by Section 501(c)(3) organizations without imposing a similar condition on veterans' organizations (App. B, *infra*, 107a-120a). In their view, Congress was justified in subjecting Section 501(c)(3) organizations to that restriction in order to reform perceived abuses of their status (*id.* at 95a-99a). Congress was likewise justified, the dissent said, in its determination not to extend that restriction to veterans' organizations because of their fundamentally different role in society (*id.* at 115a). In the dissent's view, "the important and unique public role played by veterans' groups" warranted congressional classification "as a different kind of entity deserving tax treatment different from that accorded the more generally described organizations subject to section 501(c)(3)" (*id.* at 115a-116a).

THE QUESTION IS SUBSTANTIAL

The court of appeals has erroneously held unconstitutional, on equal protection grounds, provisions of the Internal Revenue Code governing the tax-exempt status and eligibility for tax-deductible contributions of a broad range of organizations.

Under this statutory system, which has been in continuous force for almost 50 years, Congress has expressed "a sharply defined national policy" against the allowance of tax deductions for contributions to organizations, otherwise qualified under Section 501(c)(3) of the Code, which engage in substantial

activities to influence legislation. *Cammarano* v. *United States*, 358 U.S. 498, 508 (1959). This condition upon qualification for tax-exempt status and eligibility for tax deductible contributions, designed to prevent the use of tax-exempt or tax-deductible funds "to advance the personal interests of the giver * * *" (78 Cong. Rec. 5861 (1934)), was upheld by a unanimous Court in *Cammarano* as consistent with the First Amendment's guaranty of free speech (358 U.S. at 512-513).

Here, the court of appeals ruled that the absence of a similar restriction against lobbying by tax-exempt veterans' groups under Section 501(c)(19) "leads to an unconstitutional violation of equal protection principles" (App. B, *infra*, 72a). Faced with the choice of eliminating the lobbying restriction for all Section 501(c)(3) organizations, as appellee urges, or imposing it upon veterans' organizations, which the court believed to be "the most logical" course (App. B, *infra*, 76a), the court remanded the case to the district court to rewrite the statute under either of these alternatives, after inviting veterans' groups to participate in framing the relief.

Such an extraordinary disposition calls for review by this Court. The court of appeals' imposition of the duties and responsibilities of a legislative committee upon a federal district court cannot be reconciled with the separation of powers among the three branches of government that is at the heart of our constitutional system. Moreover, the decision below squarely conflicts with that of the Fourth Circuit in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), which rejected an identical equal protection challenge to Section 501(c)(3), by an organizational predeces-

sor of appellee. This Court should note probable jurisdiction in order to resolve the important constitutional question presented and to eliminate the cloud of uncertainty which the decision below has cast over the exempt organization provisions of the Internal Revenue Code.

1. Although the court of appeals unanimously rejected appellee's contention that the lobbying limitation violates its rights under the First Amendment, the majority concluded that appellee's equal protection claim was subject to strict judicial scrutiny. This determination regarding the appropriate standard of review was a critical factor in the court's ultimate decision that the lobbying limitation violates appellee's equal protection rights under the Fifth Amendment. Accordingly, we proceed at the outset to show that the lobbying limitation does not infringe appellee's First Amendment rights or otherwise involve an invidious classification which would make strict judicial scrutiny appropriate. We then show that the challenged tax classification must be sustained since it is rationally related to the achievement of a legitimate governmental purpose.

a. In 1934, Congress amended the revenue laws for the specific purpose of denying tax-exempt status and deductibility of contributions to corporations, otherwise qualifying as "religious, charitable * * * or educational," which engage in activities designed to promote or defeat legislation. Revenue Act of 1934, ch. 277, Sections 101(6) and 23(o)(2), 48 Stat. 700, 690. Carried forward unchanged into the 1939 Internal Revenue Code, and now contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954, this limitation makes any organization otherwise qualified ineligible for exemp-

tion under Section 501(c)(3) and ineligible under Section 170(c)(2) to receive tax-deductible contributions where "a substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *."[7] It thus confirmed a consistent administrative practice traceable to Treasury Rulings and Regulations promulgated under the Revenue Act of 1918.[8]

The decision below—holding unconstitutional the statutory system that imposes a lobbying limitation upon Section 501(c)(3) organizations but not upon Section 501(c)(19) veterans' organizations—has no support in the decisions of this Court construing the equal protection guarantees of the Fifth and Fourteenth Amendments. This Court has made clear that legislatures possess the widest latitude to draw distinctions between various types of organizations in the area of taxation, and that a tax classification rationally related to the achievement of a legitimate governmental purpose will not be set aside unless it is invidious or unjustifiably infringes upon a fundamental right. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-

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[7] Section 170(c)(2) governs the deductibility for income tax purposes of contributions to charitable organizations. Corresponding provisions added in 1934, now contained in Sections 2055(a)(2) and 2522(a)(2) of the 1954 Code, respectively deny deductions for estate and gift tax purposes for gifts to organizations "disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation * * *." See Revenue Act of 1934, ch. 277, Sections 406, 517, 48 Stat. 755, 760.

[8] See Treasury Regulations 45, Art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); S. 1362, 2 Cum. Bull. 152, 154 (1920).

41 (1973); *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

There is, however, no invidious discrimination in this case. Nor does the lobbying limitation substantially infringe any right protected by the Constitution. This is the teaching of *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, this Court addressed longstanding Treasury Regulations, previously sustained as consistent with congressional intent (*Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326, 335-336 (1941)), which expressed the same "national policy" as the lobbying limitations now found in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954. Those Regulations denied a deduction for business expenses, otherwise qualifying as "ordinary and necessary," if incurred for "lobbying purposes" or for "the promotion or defeat of legislation * * * ." Cf. Internal Revenue Code of 1954, Section 162(e), as amended by Section 3(a)), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973. This Court unanimously rejected the argument that denial of deductions for such expenses presented a substantial constitutional issue under the First Amendment. As the Court explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code" (358 U.S. at 513). In accordance with *Cammarano*, the lower courts have uniformly held the lobbying limitation of Section 501(c)(3) impairs no right protected by the First Amendment.

Taxation With Representation v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes Ministry, Inc.* v. *United States*, 470 F.2d 849, 856-857 (10th Cir.), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F.2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, 1181-1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).

b. The court of appeals acknowledged the force of this precedent. As it observed, "[c]haritable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits—they simply may not lobby with tax-deductible contributions" (App. B, *infra*, 34a). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring); cf. *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). It went on to conclude, however, that *Cammarano* and *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958), together require "a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (App. B, *infra*, 38a).

But the lobbying limitation imposed upon appellee bears no resemblance to the loyalty oath requirement that the Court struck down in *Speiser*. Unlike the loyalty oath that was a condition of property tax exemption, Section 501(c)(3) is "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519. As the district court here pointed out, the lobbying limitation serves the legitimate government purpose of assuring the Treasury's neutrality toward the lobbying ac-

tivities of charitable organizations, of preventing abuses of charitable lobbying by private interests, and of preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals (App. A, *infra*, 7a). Cf. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The limitation upon lobbying activities is neutral as to the points of view appellee would espouse. It therefore does not suffer the constitutional infirmity of the loyalty oath in *Speiser*. *Cammarano* v. *United States*, *supra*, at 512-513; see *Taxation with Representation* v. *United States*, *supra*; *Haswell* v. *United States*, 500 F.2d 1133, 1142, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). As Judge Learned Hand concluded with respect to a similar restriction against the deduction of lobbying expenses, "[p]olitical agitation as such is outside the statute, however innocent the aim * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930).

c. Moreover, it is well-settled that a statutory classification is not deemed invidious merely because it addresses " 'the phase of the problem which seems most acute to the legislative mind.' " *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). See *Katzenbach* v. *Morgan*, 384 U.S. 641, 647 (1966); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). The lobbying limitation is precisely such a remedial measure. According to the floor debate surrounding its enactment, "the attention of the Senate [Finance] committee was called to the fact that there [were] certain organizations * * * receiving contributions in

order to influence legislation and carry on propaganda." 78 Cong. Rec. 5959 (1934) (Sen. Harrison).[9] Although the chairman of that committee made clear his view that the limitation should be inserted elsewhere in the bill to apply to all organizations, including "war organizations," otherwise eligible for tax-deductible contributions, Congress, having his view before it, enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable and not to veterans' organizations.[10] See Revenue Act of 1934, *supra*, Sections 23(o)(2) and 101(6); Internal Revenue Code of 1954, 26 U.S.C. 170(c)(2)(D), 501(c)(3).

Finally, in 1969, and again as recently as 1976, after extensive debate, Congress reaffirmed the vitality of

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[9] See *id.* at 5861: "There is no reason in the world why a contribution * * * should be deductible if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach * * *."

[10] See 78 Cong. Rec. 5959 (1934) (remarks of Sen. Harrison). The Revenue Act of 1934, ch. 277, 48 Stat. 690, recognized five categories of organizations as eligible donees of tax-deductible contributions, including charitable organizations (Section 23(o)(2)), "the special fund for vocational rehabilitation authorized by * * * the World War Veterans' Act, 1924" (Section 23(o)(3)), and posts or organizations of war veterans (Section 23(o)(4)). The Senate amendment, to Section 23(o)(2), would have prohibited any deduction for contributions made to charitable organizations, "a substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation." The House conferees secured a concession striking out the reference to "participation in partisan politics" because of their concern that the Senate amendment was "too broad." 78 Cong. Rec. 7831 (1934); H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. 17, 19 (1934).

that limitation as a necessary curb upon the flow of tax-exempt and tax-deductible funds to charitable organizations active in political and legislative matters. 26 U.S.C. Sections 507-509, 4945 (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stats. 492-496, 512); 26 U.S.C. 501(h), 4911 (added by Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stats. 1720, 1723). See H.R. Rep. No. 91-413 (Pt. 1), 91st Cong., 1st Sess. 31-35; 46-51 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969); *Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972). As it did so, Congress turned its attention specifically to the tax treatment of veterans' organizations and continued in effect their longstanding exemption from the lobbying limitation imposed on other tax-exempt organizations. See 26 U.S.C. 501(c)(19), added by Section 2, Act of Aug. 29, 1972, Pub. L. No. 91-418, 86 Stat. 656.

This disparity in treatment of two different classes of organizations is not (and appellee has never contended otherwise) based on any "suspect" criterion. Consequently, the statutory classification challenged by appellee is not subject to strict judicial scrutiny, as the court below erroneously held, but rather merely must "be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 17; see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McRae*, 448 U.S. 297, 322 (1980).

3. In light of the foregoing considerations, we submit that the proper inquiry in this case is whether the classifications of Section 501(c) rest on a rational basis, and that the statute meets that constitutional

standard. As the Fourth Circuit correctly pointed out in *Taxation With Representation* v. *United States*, *supra*, 585 F.2d 1219, 1224 (1978), cert. denied, 441 U.S. 905 (1979), in rejecting an identical equal protection claim by an organizational predecessor of appellee, "[t]he unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." See also App. B, *infra*, 115a-116a (dissenting opinion). Veterans' organizations are composed principally of war veterans to whom the nation owes special gratitude for enduring the peril and disruption of civil pursuits associated with wartime service in the Armed Forces.[11] Both Congress and state legislatures have recognized that debt by establishing veterans' preferences and other statutory benefits "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Accord: *LeMaistre* v. *Leffers*, 333 U.S. 1, 6 (1948). The legislative authority to provide such special benefits for veterans has been sustained repeatedly against constitutional attack.[12] It follows

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[11] To qualify for exemption under Section 501(c)(19), at least 75% of a veterans' organization's members must be war veterans and substantially all of the other members must be veterans or the spouses or widows of veterans. See Rev. Rul. 55-156, 1955-1 Cum. Bull. 292 (no deductions under Section 23(o)(4) of the 1939 Code for contributions to reserve officers' association not composed principally of war veterans).

[12] See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972) (Friendly, J.); *Frederick* v. *United States*, 507 F.2d 1264 (Ct. Cl. 1974); *Bannerman* v. *Department of*

that Congress, in the exercise of its broad power to "singl[e] out • • • one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509 (1937)), has similar authority to protect the interests of veterans by allowing their organizations to use tax-deductible contributions for lobbying on matters of importance to veterans without allowing other types of organizations to lobby with tax-deductible funds.[13]

In this respect, the statute is analogous to the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (1976), that the Court upheld in *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). There, the Court rejected a First Amendment and equal protection challenge to the provision of the Act providing public funding of primary election campaigns, which allowed no funds to candidates who

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Youth Authority, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson* v. *Robison*, 415 U.S. 361, 378-383 (1974).

[13] Contrary to the court of appeals' suggestion (App. B, *infra*, 49a-50a & 65a n.44), the inquiry as to the governmental interests served by special treatment of veterans' organizations in the Internal Revenue Code need not be confined to the expressed legislative history of the statutes. As this Court recently stated in *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980), "[w]here • • • there are plausible reasons for Congress' action our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' • • • because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." See also *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970).

did not run in primary elections. Just as Congress could determine to limit public funding to a particular class of candidates without running afoul of the First and Fifth Amendments, Congress can likewise here determine that veterans' organizations can be eligible for tax exempt status and tax deductible contributions without regard to the lobbying restrictions imposed upon other types of tax-exempt organizations. Put another way, it is entirely open to Congress to foreclose lobbying activities by charitable and educational organizations at public expense without making a similar determination with respect to veterans' organizations. As the Court stated in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 105, quoting *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 647:

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Rochen* v. *Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical* Co., 348 U.S. 483, 489.

See also 424 U.S. at 105 n.143.

Furthermore, Congress has not in fact given veterans' organizations carte blanche authority to lobby with tax-deductible contributions. As the dissenting opinion below points out (App. B, *infra*, 116a-117a), the federal statutes governing the American Legion and AMVETS, among other prominent veterans' groups chartered by Congress, contain provisions barring them from engaging in partisan

political activity and otherwise limiting their political and legislative involvements. *E.g.*, 36 U.S.C. 46 (American Legion), 67d (AMVETS), 90f (Disabled American Veterans). Congress has thereby taken steps to ensure that the lobbying of veterans' organizations is directed toward the purposes for which those organizations were chartered. Cf. Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 1.501(c)(19)-1(c), requiring that veterans' organizations be operated exclusively for one or more enumerated exempt purposes in order to qualify for exemption under Section 501(c)(19) of the Internal Revenue Code. Thus, if a veterans' organization were to engage in substantial lobbying activities with respect to matters unrelated to its exempt purpose, it would be subject to loss of its exempt status under Section 501(c)(19).

4. At all events, the constitutionality of Sections 501(c) and 170(c) is an important question that should be decided by this Court. The potential impact of the decision below is confirmed by the court's recital of the numbers of charitable and veterans' organizations recognized as tax-exempt and the aggregate amounts of deductible contributions to them (App. B, *infra*, 23a-27a).[14] As the court observed (*ibid.*), an extension to Section 501(c)(3) organizations of the right now given to veterans' organizations to lobby with tax-deductible contributions would invite wholesale public subvention of partisan interests in derogation of the legitimate and clearly ex-

[14] The Internal Revenue Service advises that as of the close of 1981, approximately 300,000 organizations were recognized as exempt under Section 501(c)(3), and approximately 35,000 veterans' groups were listed as exempt under Sections 501(c)(4) and 501(c)(19).

pressed expectations of Congress. The alternative suggested course of eliminating the ability of veterans' organizations to participate in legislative activities would likewise thwart the will of Congress. Equal protection does not require that "things which are different in fact * * * to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Hence, the equal protection clause does not demand that distinct categories of tax-exempt organizations be accorded identical treatment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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